Tan Heng Poh v Tan Boon Thong & Ors

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-228 OF 1991
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI AND MOHAMED YUSOFF SCJJ
31 MARCH 1992

Land Law *— Caveat — Application to set aside private caveat — Caveat entered by residuary beneficiary of estate — Beneficiary entitled to one-sixth share of estate — Administration of estate still incomplete — Whether the caveat was defective — Whether trust for conversion created by will — Whether beneficiary's interest caveatable — National Land Code 1965 ss 322(1), 323(1) & (2)*

In this case the appellant was a beneficiary with a one-sixth share in the estate of his late father, who left a will bequeathing his properties to his six sons. There was a dispute between the members of the family concerning alleged breaches of a family arrangement entered into by all six beneficiaries which resulted in an action commenced by the appellant and another brother against the other beneficiaries for such breaches. Pending the outcome of that action, the appellant had entered a private caveat under s 323 of the National Land Code 1965 ('the Code') on all the eight parcels of land in the estate on the basis that he was beneficially entitled to them. The respondents applied to set aside the caveat, which application was allowed in the High Court. The appellant appealed.

Held, dismissing the appeal:

(1) The appellant's caveat contained a serious defect in failing to comply with the requirement of s 323(2) of the Code, as it was not expressly specified that the caveat was intended to bind only his limited interest in the eight parcels of land and not the whole land. Once the caveat was found to be legally unsustainable, the caveatee was entitled to have the caveat removed.

(2) The will empowered the executor of the estate to sell and convert any part of the estate in order to pay the testator's debts apart from the funeral and testamentary expenses. As such until the administration was complete, the value of the residue on which the appellant's one-sixth share depended, remained uncertain. There was no evidence that the administration of the estate was completed and thus, on the facts, there was a trust for conversion with the administration yet to be finalized.

(3) Under s 323(1) of the Code, since there was a trust for conversion and the appellant being a residuary beneficiary of the estate, the administration of which was still incomplete, the appellant had no caveatable claim to title or registrable interest in the eight parcels of land.

(4) As the appellant was only entitled to a one-sixth share in the estate, the caveat was not capable of being registered by virtue of

the new proviso to s 322(1) of the Code which expressly prohibits the entry of a caveat in respect of a claim involving a limited title or interest in the alienated land. Only if the caveator's claim to be beneficially entitled under the trust affecting the title or registrable interest had related to the whole land would the caveat be entered but not otherwise.

[Bahasa Malaysia summary

Di dalam kes ini perayu adalah satu benefisiari yang mendapat satu perenam bahagian harta pusaka mendiang bapanya, yang telah meninggalkan wasiat mewariskan hartanya kepada enam anak lelakinya. Satu pertikaian telah timbul di antara ahli-ahli keluarga itu berhubung dengan keingkaran persetujuan keluarga yang telah dibuat oleh kesemua enam orang benefisiari yang menyebabkan satu tindakan dimulakan oleh perayu dan seorang lagi abangnya terhadap benefisiari yang lain kerana keingkaran tersebut. Sementara menunggu keputusan tindakan itu, perayu telah memasukkan satu kaveat persendirian di bawah s 323 Kanun Tanah Negara 1965 ('Kanun itu') ke atas kesemua lapan keping tanah harta pusaka itu berdasarkan bahawa ia berhak secara benefisial kepada mereka. Responden telah memohon untuk mengetepikan kaveat itu dan permohonan itu telah dibenarkan di Mahkamah Tinggi. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Kaveat perayu mempunyai kecacatan yang serius oleh kerana ia tidak mematuhi kehendak s 323(2) Kanun itu dengan tidak menentukan secara nyata bahawa kaveat itu dicadangkan mengikat kepentingan perayu yang terhad sahaja dalam lapan keping tanah itu dan bukan dalam keseluruhan tanah itu. Sebaik sahaja kaveat itu didapati tidak boleh disokong di sisi undang-undang, penanggung kaveat berhak mendapatkan penghapusan kaveat itu.

(2) Wasiat itu memberi kuasa kepada wasi harta pusaka itu untuk menjual dan menukar sebarang bahagian harta pusaka itu supaya dapat membayar hutang pewasiat selain daripada perbelanjaan pengebumian dan perbelanjaan wasiat. Oleh kerana itu sehingga pentadbiran itu selesai dibuat, nilai baki pada mana bahagian satu perenam perayu bergantung, tetap tidak tentu. Tiada keterangan menunjukkan bahawa pentadbiran harta pusaka itu telah diselesaikan dan dengan demikian, pada fakta yang ada, terdapat suatu amanah bagi penukaran (trust for conversion) dengan pentadbiran itu belum lagi diselesaikan.

(3) Di bawah s 323(1) Kanun itu, oleh kerana terdapat satu amanah bagi penukaran (trust for conversion) dan oleh kerana perayu adalah benefisiari baki harta pusaka itu, yang mana masih belum selesai pentadbirannya, perayu tidak mempunyai tuntutan hakmilik yang boleh dikaveat atau kepentingan yang boleh didaftar ke atas delapan keping tanah itu.

(4) Oleh kerana perayu hanya berhak kepada satu perenam bahagian dalam harta pusaka itu, kaveat itu tidak boleh didaftar disebabkan

oleh proviso baru kepada s 322(1) Kanun itu yang melarang secara nyata kemasukan kaveat berkenaan dengan tuntutan yang melibatkan hakmilik atau kepentingan terhad dalam tanah berimilik. Hanya jikalau tuntutan pengkaveat yang ia berhak secara benefisial di bawah amanah menyentuh hakmilik atau kepentingan yang boleh didaftar berhubung dengan keseluruhan tanah itu barulah kaveat itu akan dimasukkan tetapi bukan sebaliknya.

Cases referred to

1 *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (folld)
2 *Mosbert Bhd (In Liquidation) v Stella D'Cruz* [1985] 2 MLJ 446 (folld)
3 *Lee Ah Thaw & Anor v Lee Chun Tek* [1978] 1 MLJ 173 (refd)
4 *Khoo Teng Seong v Khoo Teng Peng* [1990] 3 MLJ 37 (refd)
5 *N Vangedaselam v Mahadevan & Anor* [1976] 2 MLJ 161 (not folld)
6 *Tee Chin Yong v Ernest Jeff* [1963] MLJ 118 (refd)
7 *Woo Yok Wan v Loo Pek Chee* [1975] 1 MLJ 156 (refd)
8 *Pok Kew Chai v Yeoh Thian Seng & Anor* [1975] 1 MLJ 220 (refd)

Legislation referred to

National Land Code 1965 ss 322, 323

Appeal from: Originating Summons No S6–24–878–1990 (High Court, Kuala Lumpur)

Prasad Abraham and *Murali Achan* (*Xavier and Chandran*) for the appellant.

DP Naban and *Premala Pathmanathan* (*Skrine & Co*) for the respondents.

Mohamed Azmi SCJ (delivering the judgment of the court): This was an appeal against the order of the High Court made in Kuala Lumpur on 15 May 1991, allowing the respondents' application to set aside a private caveat entered by the appellant on 26 October 1989 and extended by order of court dated 21 June 1990. It was common ground that the entry of the caveat was made under s 323(1)(b) of the National Land Code 1965 ('the Code') because the caveator was claiming to be beneficially entitled under a trust created by a testator affecting certain alienated lands in Kuala Lumpur.

The case involved a dispute between six members of the Tan family over properties left by their late father, Mr Tan Kee who died on 23 January 1969. By his last will the deceased left all his properties to his six sons in equal shares and appointed the third son, Tan Boon Thong (the first respondent before us) to be the sole executor and trustee of his estate. By Petition No 395 of 1969, Tan Boon Thong applied to Kuala Lumpur High Court and duly obtained a grant of probate on 14 April 1971. The appellant (herein referred to as 'the caveator') was one of the brothers and was beneficially entitled to one-sixth interest in the following properties:

(a) EMR 6651 Lot 1576, Mukim of Batu (now held under GM 284); A
(b) EMR 6652 Lot 1578, Mukim of Batu (now held under GM 285);
(c) EMR 5275 Lot 1842, Mukim of Batu (now held under GM 1508);
(d) EMR 5101 Lot 1878, Mukim of Batu (now held under GM 917);
(e) EMR 2630 Lot 1217, Mukim of Batu — one-half undivided share (now held under GM 1639); B
(f) EMR 4908 Lot 2523, Mukim of Batu — one-half undivided share (now held under GM 1735);
(g) EMR 5201 Lot 2524, Mukim of Batu — one-half undivided share (now held under GM 1803);
(h) EMR 3763 Lot 2529, Mukim of Batu — one-half undivided share (now held under GM 1515). C

On 21 July 1989, the appellant and another brother, Tan Chai Chof @ Tan Bu Jee commenced proceedings against the other beneficiaries, one of whom was the personal representative of the estate of Tan Tong @ Tan Boon Thong (now deceased). The other defendants were two companies allegedly having close connection with the executor. The cause of action in D the Kuala Lumpur High Court Civil Suit No S6–22–595 of 1989 was for breach of a 'family arrangement' entered by all the six beneficiaries on or about 1974. Under the 'family arrangement', the caveator and Tan Chai Chof @ Tan Bu Jee agreed to make a gift of their beneficial interests in the estate in favour of the other four brothers (first, second, third and fourth caveatees) in consideration of two portions of the testator's property, viz E half an acre respectively in the land held under GM 1639 for Lot 1217 and GM 917 for Lot 1878 (ie property marked (d) and (e) above) being transferred to the caveator.

In the said civil suit, the caveator and the other brother Tan Chai Chof @ Tan Bu Jee, claimed for the removal of Tan Boon Thong (the first F respondent/caveatee) as executor and trustee of the will, and for the official administrator to be appointed trustee of the estate. They also prayed for all dealings in the testator's property purportedly carried out under the 'family arrangement' be set aside and vested in the official administrator, and also for accounts and damages for breach of trust and other ancillary reliefs. Pending the outcome of the civil suit on the 'family arrangement' dispute, G the caveator entered a caveat under s 323 of the Code on all the eight parcels of land on the basis that he was beneficially entitled to the properties under the deceased's estate. A lengthy statutory declaration verifying the caveator's claim was attached to the Form 19B in which the will of the deceased, grant of probate, and a copy of the civil suit were exhibited. It H could not be disputed that if the civil suit were eventually decided in the caveator's favour, the main results would be to relieve all concerned from liability under the 'family arrangement' and to restore the respective one-sixth shares of the caveator and the other beneficiaries as originally bequeathed under the will of their late father.

In the circumstances, the important question for determination in this I appeal was whether as a beneficiary of a one-sixth share in the estate, the caveator was entitled to have the caveat continued over the whole eight parcels of land, in an application by the caveatees for removal of the caveat

under s 327 of the Code. Applying the principle enunciated by the Privy Council in *Eng Mee Yong & Ors v Letchumanan*[1] at p 215, in an application by the caveatee for the removal of a caveat, the onus lies upon the caveator under s 327,

> to satisfy the court that on the evidence presented to it, his claim to an interest in the property does raise a serious question to be tried; and having done so, he must go on to show that on the balance of convenience it would be better to maintain the status quo until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

In allowing the caveatees' application to remove the caveat, the learned judge did not provide a written judgment. But from the notes of evidence, it was possible to gather that the learned judge must have agreed with the two main arguments put forward by counsel for the caveatees (applicants in the court below). Firstly, it was argued that the caveat entered was defective, and secondly, the caveator had no right to caveat, he being merely a beneficiary of a one-sixth share under the testator's will; in short, he had no caveatable claim or interest in the whole eight parcels of land.

On the first issue, Mr L Sabapathy, who appeared for the caveatees in the court below, had submitted that the caveat itself was bad and defective, but Mr Prasad Abraham for the caveator appeared to be rather silent on this point. The defect complained of was apparent in the Form 19B itself where the appellant/caveator had expressly intended the caveat to have the effect of binding the whole eight parcels of land instead of binding only the beneficial interest in the said lands limited to his one-sixth share.

Under s 322(1) of the Code, a private caveat may be entered by the registrar at the instance of any of the persons or bodies specified in s 323, and should be expressed either to bind the alienated land itself or to bind only a particular interest in the said land. The persons or bodies specified in s 323 may be paraphrased as those:

(1) claiming title to any alienated land;
(2) claiming any registrable interest in any alienated land;
(3) claiming any right to title or any registrable interest in any alienated land;
(4) claiming to be beneficially entitled under any trust affecting any alienated land or registrable interest in the said land; and
(5) claiming to be entitled as mentioned in (4) by the guardian or next friend of any minor.

Section 323(2) expressly requires, firstly, that Form 19B should be used, and secondly, that the caveator must specify therein not only the nature of the claim on which his application is based but also to state expressly whether the caveat is to bind the land or a particular interest only. In our view non-compliance with these requirements may be fatal and may be a valid ground for removing a caveat at the instance of the applicant.

At p 82 of the appeal record, the Form 19B read with the statutory declaration showed that whilst the appellant did sufficiently particularize the nature of his claim on which his application was based, he ought to have expressly specified that the caveat was intended to bind only his limited

interest in the eight parcels of land and not the whole land. In our view the caveat contained a serious defect in failing to comply with the requirement of s 323(2). There is a clear distinction in the effect of a caveat expressed to bind the land itself under s 322(2) and one to bind a particular interest only under s 322(3). The question may therefore be asked that if you have only a limited caveatable claim or interest in the land, how can you caveat the whole land?

The main ratio of the judgment of this court in *Mosbert Bhd (In Liquidation) v Stella D'Cruz*[2] is to the effect that once a caveat is shown to be defective, it is no duty of the court to save it by amendment. In relation to the power of the court to order remedial affidavit to be filed for the purpose of s 417 of the Code, Seah SCJ had this to say at p 448:

> It is plain that the caveat was intended to forbid the registration of any dealing affecting the whole land and was not confined to private Lot No 460 only. In our opinion, sub-s (2) does not empower the High Court to make such an order. The section is of limited application only and is intended to authorize the High Court to direct the Land Registrar to do all such things as may be necessary to give effect to any judgment or order made by the court affecting the land. It does not, in our judgment, give power to the court to allow a defective or void private caveat to be amended by the caveator. For the purpose of deciding whether a private caveat is defective or void the High Court should confine itself to the caveat and other relevant supporting documents. The procedure to be adopted should be a simple and summary one. This matter appears to have been dealt with in detail by the Privy Council in the case of *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 and at p 214 Lord Diplock said:
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> > 'Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law.'

Since the entry of a caveat was a blot on the title, we agreed with the view that once the caveat was found to be legally unsustainable, that should be the end of the matter, and the caveatee was entitled to have the caveat removed where the caveator's claim was baseless, frivolous or vexatious.

The second issue was more fundamental as it was based on the fact that the caveator was a residuary beneficiary and that when the caveat was entered, administration of the estate was still incomplete. For the purpose of determining whether the cavator's interest was ascertainable or whether there was a trust for conversion, it is convenient at this stage to reproduce the relevant part of the will:

> 'Last will'
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> I, Tan Kee (I/C 2776213) of TB Segambut New Railway Station, Kuala Lumpur, in the State of Selangor, do hereby revoke all former wills and codicile [sic] heretofore made by me and declare this to be my last will and testament.
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> 1 I appoint my son Tan Boon Thong (I/C 2672934) of TB Segambut New Railway Station, Kuala Lumpur, in the State of Selangor, to be the sole executor and trustee of this my last will and testament.

2 I declare that the expression 'my trustee' shall where the context so admits mean and include the trustee or trustees for the time being hereof whether original or substituted.

3 I give device [sic] and bequeath all my properties movable and immovable of whatsoever description and wheresoever situate *to my following six (6) sons in equal share* for their own use and enjoyment:

(i) Tan Cheong Soon alias Tan Cheng Soon (I/C 7935054) — one (1) share;
(ii) the said Tan Boon Thong (I/C 2672934) — one (1) share;
(iii) Tan Yee (I/C 7892750) — one (1) share;
(iv) Tan Chai Chof alias Tan Bu Jee (I/C 2775175) — one (1) share;
(v) Tan Tong alias Tan Boo Thong (I/C 7893314) — one (1) share;
(vi) Tan Heng Poh (I/C 3985353) — one (1) share.

4 *I direct that my trustee shall have power to sell, call in and convert any part of my estate as he shall deem expedient.*

5 I direct my trustee to distribute my estate as soon as it is expedient.

6 I direct my trustee to pay all my just debts and funeral and testamentary expenses.

In witnees [sic] whereof I have hereunto set my hand ... witneesses [sic].

Right thumb mark
of
Tan Kee
(Emphasis supplied.)

In *Lee Ah Thaw & Anor v Lee Chun Tek*,[3] the Federal Court, dealing with s 18 of the Trustees Ordinance 1949 and s 173 of the Sarawak Land Code (Cap 81), held that since the trust under the will was a trust for conversion, the appellants as residuary beneficiaries did not have a caveatable interest in the land when the administration of the estate was incomplete and as such the worth of the residue was still uncertain. In that case, the three beneficiaries were not satisfied with the manner the estate was administered. They believed the respondent, the executor and trustee of the estate under the deceased's will was using the estate money to invest in properties for his own benefit. Consequently, they entered a caveat and filed an action in the High Court against the respondent for accounts and a declaration in respect of certain property. One of the main issues in that case was whether the trust created under the will was a trust for conversion. It was held that a trust for conversion would be implied when real and personal properties were given for division in such a manner as could only be effectuated by sale of the lands. Both the High Court and the Federal Court found that there was a trust for conversion by implication by virtue of ss 4, 5, 18(1) and (2) of the Trustees Ordinance 1949. The residuary beneficiaries (caveators) were not entitled to a share in the residue of the estate until the residue was finally ascertained after the completion of administration. Until then their respective shares in the residue were of uncertain nature. In law, the residuary beneficiaries had no 'interest' in the lands before administration was completed and therefore had no caveatable claim or interest under s 323(1). Similarly, in *Khoo Teng Seong v Khoo Teng Peng*,[4] Lim Beng Choon J on the undisputed facts of the case should have found what in

effect was a trust for conversion under the will. In that case, the 19 residuary beneficiaries including the two caveators were entitled to certain shares of the residue and the caveats were entered to restrain the executor of the will from transferring the testator's land under a sale and purchase agreement to a company at a price allegedly below the market value. Both *Lee Ah Thaw*[3] and *Khoo Teng Seong*[4] applied the established principle that where the administration is incomplete 'the legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained'.

In our view, the fact that the caveator was entitled until the will to a one-sixth share in the eight parcels of land, did not mean that his share was ascertainable before administration was complete. As expressed in the deceased's will, the caveator was in fact entitled to only one share, and para 4 of the will empowered the executor to sell and convert any part of the estate in order to pay the testator's debts apart from the funeral and testamentary expenses. As such, until the administration was complete, the value or extent of the residue on which his one-sixth share depended, remained uncertain. On established authorities, clearly the caveator in the present appeal had no caveatable claim or interests in any of the property when the caveat was entered. There was no evidence that the administration of the estate was already complete to ascertain the actual worth of the residue for final distribution. On the facts, there was undoubtedly a trust for conversion and administration was yet to be finalized.

The other question that arose was that even if there had been no trust for conversion, could a person who was only interested in a specific portion of land enter a caveat against the land, having regard to the new proviso to s 322(1) of the Code? With effect from 25 March 1985, a proviso has been added by Act A587 which provides: 'Provided that such a caveat shall not be capable of being entered in respect of a part of the land.'

In concluding his judgment in *Mosbert*'s case,[2] Seah SCJ, in referring to the new amendment observed at p 449 that the judgment of the court dealing with the private caveat 'would now seem to be of academic interest only'. We took this to mean that as from 25 March 1985, no caveat could be entered by the registrar against any land where the caveator was interested in a specific portion of it even though the effect was expressly intended to be limited only to that specific portion.

In our view the new proviso in s 322(1) had indeed affected the judgment of the Federal Court in *N Vangedaselam v Mahadevan & Anor.*[5] With the greatest of respect, the learned Lord President had correctly stated the law as it stood, at p 163:

> ... you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion, you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.

The amendment has changed the law by expressly prohibiting the entry of a caveat in respect of a part of alienated land. The nature and effect of private caveats under s 322 is now subject to an omnibus proviso that, 'such a caveat shall not be capable of being entered in respect of a part of the land'. Thus, notwithstanding the fact that a person can bring himself under

A one of the categories of persons under s 323(1) at whose instance a private caveat may be entered, the registrar is now prevented from entering a caveat whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim or interest under s 323(1) relates to only part of the land. In our opinion , this is the only reasonable interpretation of the new proviso. Any other interpretation would appear to make it meaningless, and inconsistent with the Torrens system of giving certainty and indefeasibility to registration of land title, save for fraud or misrepresentation in the transfer or registration itself. The legal position prior to *Vangedaselam*[5] would now appear to be authoritative, which means that a person who is interested only in a specific portion of land cannot enter a caveat against the land (see *Tee Chin Yong v Ernest Jeff*;[6] *Woo Yok Wan v Loo Pek Chee*[7] and *Pok Kew Chai v Yeoh Thian Seng & Anor*[8]). For the purpose of entry and registration, a private caveat should bind the whole alienated land or the whole registrable interest in the said land. If a person claimed only a limited title or interest in the alienated land, then his caveatable claim would be caught by the new proviso to s 322(1). Thus, the present application for caveat under s 323(1)(b) could only have been entered and continued if the caveator's claim to be beneficially entitled under the trust affecting the title or registrable interest, had related to the whole land but not otherwise.

Under s 323(1) of the Code, we are of the opinion that since there was a trust for conversion in the will, and the appellant being a residuary beneficiary in the deceased's estate, the administration of which was still incomplete, he had no caveatable claim to title or registrable interest in the eight parcels of land. We are also of the opinion that being entitled to only a one-sixth share, the caveat was not capable of being registered by virtue of the new proviso to s 322(1) of the Code as it would be binding in respect of only part of the alienated land, and the proviso cannot be circumvented by a defective Form 19B. The order of the learned judge removing the caveat, though regretfully made without a written judgment or grounds of judgment, was correct in law and must be upheld.

We had accordingly dismissed this appeal with costs, and ordered the deposit to be paid to the respondents to account of taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim